TO BE ARGUED BY: Terence L. Kindlon
TIME REQUESTED: 30 Minutes

NEW YORK STATE COURT OF APPEALS

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

CHRISTOPHER PORCO,

Appellant,

APPELLANT'S BRIEF

January 19, 2010

KINDLON SHANKS and ASSOCIATES
Terence L. Kindlon
Kathy Manley
Attorneys for Appellant Christopher Porco
74 Chapel Street
Albany, New York 12207
(518) 434-1493
Fax: (518) 432-7806

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

NY Cases:

Other Jurisdictions:

PRELIMINARY STATEMENT

Christopher Porco was convicted of the murder of his father and attempted murder of his mother by smashing their heads with an axe in the middle of the night while they slept together in the darkened bedroom of their home in the Albany suburb of Delmar, New York. The prosecution was based almost entirely on circumstantial evidence. The *only* direct evidence at trial was testimony by government witnesses that Christopher's grievously injured mother, Joan Porco, several hours after the attack, and after police had fully secured the crime scene, and while suffering from untreated and profound wounds to her eyes, face, brain and head, *nodded* in response to police questions concerning whether her son, Christopher, had "done this" to her.

The "nodding" testimony—held to be *testimonial hearsay* by the Second Department—was improperly received in violation of Appellant's constitutional right to confrontation and *Crawford v. Washington,* (541 U.S. 36 [2004]). Joan Porco's treating neurologist testified that it was "extremely unlikely if not impossible" that, at the time of the questioning, she would have been physically capable of remembering the attack or responding meaningfully to questions about it. And, although Joan Porco physically took the witness stand and testified during appellant's trial, for cross-examination purposes she was an utterly unavailable witness. Joan Porco was an unavailable witness because she *never*

had any memory of the attack, and because of that it was impossible for Appellant to cross-examine her about this crucial evidence.

The "nodding" evidence violated Appellant's constitutional right of confrontation and, because it was the linchpin of the prosecution's case, its introduction was not harmless beyond a reasonable doubt. Additionally, were it not for the improper introduction of the nodding evidence, the court would have given a circumstantial evidence jury instruction that would have applied to all of the proof. With such an instruction, a fair assessment of the evidence and/or the lack of evidence would have resulted in an acquittal.

The prosecution was also improperly allowed to introduce evidence that, two years before the murder, Christopher Porco faked a burglary at his home. The court allowed this evidence under the *modus operandi* exception to the *Molineux* rule, although it lacked the highly unique characteristics necessary for that exception to apply. The evidence was extremely prejudicial, for it suggested that if Appellant had a propensity to stage burglaries at his home, there was nothing he would not stoop to, including a vicious and unprovoked attack on his sleeping parents. As with the nodding evidence, the error can not be considered harmless.

The violation of Appellant's constitutional right to confrontation was not harmless beyond a reasonable doubt and deprived him of a fair trial. As a consequence the convictions must be set aside.

QUESTIONS PRESENTED

1. Did the Second Department erroneously hold that Joan Porco was "available" to testify, given that she never had any memory of the relevant events?

2. Should this Court find the error in allowing the "nodding evidence" - the only direct evidence in the case - to be harmless?

3. Did the Second Department err in upholding the admission of evidence of a prior "staged burglary" which did not fit within the identity exception to *Molineux?*

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to CPL 460.20. A Certificate granting leave to appeal was granted on September 21, 2010 and is included at R-1;A-1.

The issue of the erroneous introduction of the "nodding" evidence was preserved at R-137-165, 329-337, 1981-1982; A-41-69, 76-84, 171-172, and the issue with respect to the "staged burglary" evidence was preserved at R-387-391, 5,420-5421; A-110-114, 368-369.

STATEMENT OF FACTS

INTRODUCTION

Christopher Porco was convicted of the murder of his father, Peter Porco, and the attempted murder of his mother, Joan Porco (hereinafter "Joan"), by attacking them with an axe while they slept in the darkened bedroom of their home in the Albany suburb of Delmar. The case was almost entirely based upon ambiguous, contested circumstantial evidence. The *only* direct evidence was testimony that the surviving, but profoundly injured victim, Joan, nodded her head in response to police questioning. This "nodding" evidence was repeatedly emphasized by the prosecutor who described it four times in his opening statement, and *twelve* times in closing argument.

There were numerous contradictions and inconsistencies in the "nodding" testimony – for not only was it uncontested that Joan did not remember being attacked, but a detective and the two paramedics present described events leading to the alleged nod quite differently. This testimony was improperly introduced in violation of Appellant's constitutional right of confrontation and *Crawford v. Washington*, 541 U.S. 36 (2004), as the nodding was in response to police questioning designed to determine the identity of her attacker and therefore constituted testimonial hearsay. Although Joan took the stand, she testified that she had no memory of the attacks or of the police questioning, and thus, under

Crawford, there was no meaningful opportunity for cross-examination with regard to the testimony regarding those events.

Joan's treating neurologist advised the court and the jury that it was "extremely unlikely, if not impossible" that Joan would have been physically capable of remembering what had occurred during the attack. The neurologist also described how traumatic brain injuries such as Joan's disrupt a person's ability to process information in any meaningful way, and she testified it would be impossible to determine what, if anything, Joan either understood or meant to convey if and when she was questioned by police before receiving significant medical treatment.

Despite its lack of reliability, the nodding evidence, presented at considerable length by three different prosecution witnesses, was permitted and was profoundly prejudicial to the Appellant. In truth, it is difficult to imagine anything more prejudicial to the accused than testimony that his mother, on her death bed, accused him of murdering his father and attempting to do the same to her. It was impossible for the jury to disregard such "testimony" and fairly consider the balance of the evidence presented or to critically evaluate the lack of concrete evidence linking Appellant to the crime. One thing is clear: after the detective concluded that Joan had answered his question, the police were convinced Appellant was guilty, and he became the focal point of the entire

investigation, to the exclusion of following any leads or considering any evidence which did not fit within their theory of his guilt.

Aside from the testimony related to the "nodding" the case was otherwise based on a tangle of inconclusive circumstantial evidence. Significantly, there was no *physical* evidence connecting Appellant to the attacks. In contrast, there was a wealth of evidence favorable to the defense and evidence pointing to the existence of another perpetrator. Joan, the surviving parent, testified on behalf of her son and is convinced of his innocence.

In the absence of any contradictory evidence, this testimony by the victim of a crime, that the person charged was not capable of committing such a horrific crime and that there were others she suspected of being the perpetrator, would clearly have raised a reasonable doubt in the minds of the jurors. However, the government used the evidence of the alleged nod to undermine Joan's testimony, intimating that the "nod" was the unreflective "truth" and that her subsequent testimony on behalf of her son was the misguided musings of a parent in denial. In fact, they told her that they knew her son better than she did.

The importance of the "nodding" evidence was underscored by the fact that the prosecutor referred to the alleged "nod" four times in his opening statement, and *twelve* times in closing argument. (R-1689, 1691, 1692, 1693, 5353[twice], 5354[twice], 5355, 5362, 5364, 5365, 5366, 5437[three times]; A-146, 148, 149,

150, 358[twice], 359[twice], 360, 361, 362, 363, 364, 370[three times]) In fact, the prosecutor spent a long time discussing the alleged nodding in the beginning of his summation, and then came back to re-emphasize it at the very end of closing argument, which clearly underscores its crucial importance to the prosecution's case.

In closing argument, after some introductory comments, the prosecutor stated:

> "I told you in the beginning of this case, ladies and gentlemen, that the case started with a nod and I told you it didn't end with a nod.
>
> It started with the nod of Joan Porco as she lay in bed after the attack and you've heard all of the proof from the witnesses who were the first responders there.
>
> ***
>
> She was adamant. *There was no mistaking her response. She was nodding her head. She was using her fingers to express to the police who committed this terrible crime and all those people who were in the bedroom that day, ladies and gentlemen.*
>
> ***
>
> You know, did she nod her head yes? They all said yes...
>
> ...[W]ithout equivocation, they all agreed that, they all perceived her answers to indicate that man right there, Christopher Porco, was the one responsible for what had happened." (R-5353-5355; A-358-360)

The prosecutor then threw in references to the "nodding" several other times throughout the closing, and then, right near the end of the closing, stated:

> "...I submit to you, ladies and gentlemen, there are two inferences which you could reasonably make:
>
> 1. Is that Christopher Porco is guilty, or
>
> 2. that Christopher Porco is the unluckiest man on the face of the planet, because on the morning that his parents are attacked and his father is

brutally murdered, his mother nods yes, when asked if he did it." (R-5437; A-370)

The "nodding" evidence was the only direct evidence in the case. The balance of proof consisted of circumstantial evidence, including incomplete and inconclusive mitochondrial DNA from a Thruway toll ticket; inherently incredible testimony from Thruway toll agents who claimed to remember Appellant's Jeep out of the thousands of vehicles passing through their lanes; University of Rochester closed circuit television surveillance footage showing that Appellant's Jeep was not in certain locations at certain times (but none showing where it was located at those times); testimony from students who saw Appellant on campus at certain times and did not see him at other times; testimony that the alarm system at the Porco residence had been disarmed at 12:14am on November 15, 2004 by someone with knowledge of the master code; and a claim from a neighbor that he had seen a yellow Jeep, similar to Appellant's, in the Porco driveway in the early morning hours of November 15.

As to the DNA sample from the Thruway toll ticket, the prosecution's expert conceded it was the most minimal profile she had ever analyzed, and the defense expert testified that in his opinion such a small sample could not be reliably analyzed. (R-4511, 4549, 4806, 4838; A-283, 284, 301, 302) Moreover, rather than excluding almost everyone other than Appellant, both experts agreed

that only three of the eight other people likely to have handled the ticket could be excluded from having contributed DNA to the sample. (R-4564-4565, 4775; A-285-286, 300) Thus this evidence, while quite prejudicial, was essentially meaningless.

Two Thruway toll agents, one in Rochester and the other in Albany, testified that they remembered seeing Appellant's yellow Jeep come through their stations at relevant times. (R-2535-2538, 2550; A-194-197, 201) However, the agents only made these claims after police showed them a picture of the Jeep, and they did not recall seeing any other particular vehicles, only remembering, conveniently, the Jeep in question. (R-2539-2540, 2544-2545, 2551, 2560; A-198-200, 202, 206) There were also serious contradictions in the testimony of one of the toll agents. (R-2553, 2557, 2559, 2561-2562; A-203-205, 207-208)

As to a University of Rochester roadway/parking lot surveillance video, it suggested the Jeep was allegedly seen on campus at 10:30pm on November 14, and then was allegedly not seen again on the video until between 8:00-9:00am the following morning. (R-2814, 2834-2835; A-222-224) However, the defense brought out that there were many surveillance cameras which had never been examined to see if the Jeep had been at some other location on campus during the intervening times. (R-3768-3770; A-246-248) And in any event, even if the Jeep

had not been on campus, the evidence showed nothing about where the Jeep was, only where it wasn't.

Similarly, the University of Rochester students testified to the effect that Appellant had last been seen on campus between 10:30-11:00pm on November 14, and was seen again at approximately 8:45am on the 15th. (R-2631, 2637, 2643, 3115, 3117, 3121; A-210-212, 228-230) There was a lot of testimony that he had let a fraternity representative sleep in his dorm room that night, and said he would sleep in the lounge, but apparently did not do so. (R-2598, 2691-2692, 2700-2701, 2729, 2741-2742, 2763, 2765, 3052, 3097, 3100; A-209, 213-221, 225-227) Again, this only shows where Appellant was not located, not where he was.

With regard to the Porco home alarm system, there was testimony that it had been disarmed using the master code at 2:14am on November 15, and that there were only six people who had access to the master code - Joan and Peter Porco, their two sons and two neighbors. (R-2066-2067, 3434; A-179-180, 231) However there was no indication that the alarm system had ever been tested and there had been errors with the date and time on other occasions. (R-2056-2057, 2061, 2064, 2077-2080; A-175-178, 181-184) Moreover, there was testimony that sometimes Peter would disarm the alarm in the middle of the night to let the dog out, and would forget to rearm it. (R-4664; A-299)

A neighbor testified that after a relative spoke to him about this case, he contacted police and claimed to have remembered seeing Appellant's Jeep in the Porco driveway at approximately 4:00am on November 15. (R-4601-4606; A-288-293) However, there were no street lights on the Porcos' street, the witness conceded, and he could see only 10-15 feet with his headlights - the closest point of the Jeep was about 10-12 feet back from the road. (R-4619, 4630, 4643; A-294-295, 297) He also had trouble describing the Jeep (R-4600, 4603-4604, 4637; A-287, 290-291, 296)

The record contained a significant amount of evidence favorable to the defense, including medical testimony putting Peter's likely time of death outside the parameters of the prosecution's theory. (R-3917-3919, 3925, 3977, 3979, 3987-3988; A-257-264) Additionally, there was no evidence that either the murder scene, which was a bloodbath, nor Appellant's Jeep, had been cleaned after the attacks. (R-3562; A-235) This is significant because neither contained any physical evidence whatsoever that implicated Appellant.

There was, however, evidence pointing to the possible involvement of others. For example, a disinterested witness testified that he observed two unidentified cars speeding away from the area of the Porco home in the early morning hours. (R-4904-4910; A-303-309) Additionally, an unidentified fingerprint was found on the phone box outside the Porco home next to where the

phone wires had been cut the night of the attacks. (R-3534, 3864-3867, 3887-3888; A-234, 251-256) DNA from at least two *unknown* individuals was collected from Peter's wristwatch, located on the nightstand next to his bed. (R-4060-4062, 4245; A-265-267, 277) Further, there was testimony that Peter had received serious death threats as the result of prior work as an attorney; that Peter's great uncle, also named Porco, was a known Mafia figure in the metropolitan New York City area who had become a federal government "snitch;" and there was testimony about a stranger lurking in the Porco driveway on two occasions in the weeks prior to the attacks. (R-3777, 3779, 4149, 4164, 4167-4168, 4355-4357, 4369, 4663-4664, 5107-5121, 5130-5134; A-249-250, 269-272, 279-282, 298-299, 337-356)

EVIDENCE OF 'NODDING"

Pretrial Motions

The prosecution filed a pretrial motion seeking leave to present evidence that Joan was claimed to have nodded her head "yes" when asked if her son Christopher had committed the attacks. (R-65-103; A-2-40) This police questioning occurred well after the crime scene had been secured, several hours after the attacks when Joan was near death and the police believed she would not survive. As discussed below, she suffered a traumatic brain injury which resulted in total memory loss of the attack and the police questioning.

The defense strongly opposed this evidence, and submitted a memorandum

arguing that it was both completely unreliable and a violation of *Crawford*. (R-137- 165; A-41-69). Supplemental memoranda and exhibits were also filed. (R-192-197, 329-337; A-70-84) The court entered a Decision and Order shortly before trial, holding that the "nodding" evidence could come in as an "excited utterance," and finding, also, that *Crawford* did not apply because Joan was "available to testify" (R-338-343; A-85-90). As discussed below, this constituted reversible error.

Paramedics Kevin Robert and Dennis Wood

A first-responder, Paramedic Kevin Robert, testified that after the Porco home was "secured" by police, he went inside and found Joan lying on a bed in the darkened master bedroom with profound injuries. (R-1875, 1878, 3608, 4241; A-151-152, 238, 275) He said she was moving her hands and legs back and forth. (R-1879; A-153) Robert and another paramedic attempted to give Joan oxygen and to assess her injuries. (R-1880-1881; A-154-155) Robert quickly realized he would need to intubate her because her airway was not clear. He radioed a physician for medical permission to administer the sedatives necessary for the intubation. (R-1883; A-156) Robert said he believed Joan was able to follow commands because she kept her legs still when he asked her, and held her arm out straight upon request. (R-1885; A-157) He did not recall restraining her, nor did he recall anyone else doing so. (R-1908-1909; A-160-161)

Robert said he was preparing to do the intubation when Det. Bowdish entered the room and started asking Mrs. Porco questions. (R-1888; A-158) Prior to coming into the house Det. Bowdish had taken steps to determine that there were two Porco children, Jonathan and Christopher. (R-3608-3610; A-238-240) Robert said the IV line was already inserted when Bowdish entered (R-1925; A-162) and that the detective's first question was if a family member had been involved in this incident. (R-1888; A-158) Robert said that Joan shook her head up and down. Robert said that then Bowdish asked if Johnathan or Christopher were involved, and indicated that Joan did not really respond. (R-1888; A-158) Robert testified that *he* then asked Joan if Johnathan was involved, and she shook her head side to side and moved her hand side to side as well, suggesting a negative response. (R-1889; A-159) Robert said he then asked if Christopher was involved and Joan moved her head up and down, and also moved her hand back and forth, pointed up. (R-1889; A-159) Robert said that then Bowdish asked the same two questions about Johnathan and Christopher, and got the same responses. (R-1889; A-159)

In contrast to his trial testimony, at the suppression hearing, Paramedic Robert testified that only three questions (rather than four) had been asked of Mrs. Porco, and that the first one was "Did Christopher or Jonathan do this to you?" (R-1930; A-163)

Paramedic Dennis Wood, on the scene with Robert and Detective Bowdish, also testified that he witnessed the "nodding" evidence, but his testimony was substantially different in several respects. Wood said that when Bowdish began asking questions, the first was whether one of her sons had done this. (R-1949; A-164) He said Joan shook her head up and down for yes, and pointed her finger straight up in the air. (R-1949; A-164) Significantly, Wood said that *Bowdish* then asked her if it was Christopher, and said that she shook her head 'yes' and pointed her finger in the air. (R-1949-1950; A-164-165) He said Bowdish then asked if it was Johnathan, and said that she shook her head 'no' and waved her finger back and forth. (R-1950; A-165) Wood said Bowdish then repeated the two questions and got the same responses. He said that at that point, Kevin Robert had established the IV line, Joan was sedated, and they began the intubation process. (R-1950; A-165)

In clear contrast to Robert's testimony, Wood said that he did not hear Robert ask *any* questions of Joan, and that all the questions were asked by Bowdish. (R-1959-1960; A-168-169)

Wood had previously testified in the Grand Jury that Joan "was yelling very frantic and we were trying to calm her down, restrain her best we could so we could treat her." (R-1954; A-166) At trial, Wood attempted to change his story and he then claimed that he thought the word "yelling" had been a mistake on the part

of the stenographer, but he did say that he remembered holding Joan's arm so Robert could start the IV. (R-1956, 1962; A-167, 170)

Detective Bowdish

Detective Bowdish testified that after Joan was discovered in her bedroom he went outside of the home and he asked his colleague, Lt. Heffernan, to find out the names of the Porco sons, and that Heffernan called the police station and relayed the names of Johnathan and Christopher to Bowdish. (R-3608-3610; A-238-240)

Bowdish went back upstairs and asked the paramedics if he could have a moment to question Joan. (R-3610; A-240) He claimed that he then asked Joan if she could hear him, and she nodded her head up and down several times. (R-3611; A-241) He then asked if a family member had done this, and she again nodded up and down. (R-3611; A-241) He claimed he asked if Johnathan had done this, and she shook her head back and forth. (R-3611; A-241) Bowdish said he then asked if Christopher had done this to her, and said she nodded her head up and down.(R-3611; A-241) Bowdish said that he repeated the questions regarding Johnathan and Christopher and got the same responses. (R-3611; A-241) At that point, Det. Bowdish spoke to Lt. Heffernan and they decided to put out a police bulletin (BOLO or Be On the Look Out) for Christopher Porco - the BOLO said

Christopher may be armed and dangerous and his vehicle should be seized. (R-3612, 3716; A-242, 245)

In contrast to Wood's testimony, Bowdish said he did not see the paramedic restrain Joan Porco's arms. (R-3680; 243) He also said, in equally sharp contrast to Kevin Robert's testimony, that he was the only one who asked Mrs. Porco any questions. (R-3704; A-244)

Joan Porco

Joan testified her last memory before the attacks was from around noon the previous day, when she had gone to church. (R-4180; A-273) Her first memory after the attacks was toward the end of her stay at Albany Medical Center, several weeks later. (R-4180; A-273) .

Joan also testified that the bedroom where she and her husband Peter slept was kept very dark, with thick curtains, as well as pleated shades, because she and Peter preferred it to be extremely dark, especially in the morning. (R-4241; A-275) She said it would be impossible to see anyone in the room in the middle of the night when the lights were out. (R-4242; A-276) Joan testified that she was very upset that the police believed her son Christopher was the attacker, and that she was convinced he was not capable of such a crime. (R-4329; A-278)

Dr. Paul Spongas

The prosecution called Dr. Paul Spongas, who testified as one of Joan's treating physicians and as an expert in neurosurgery, but, significantly, not as an expert neurologist. (R-2263, 2271; A-185, 190) Dr. Spongas described Joan's injuries and surgery, and said he operated on her for six hours of her twelve-hour surgery, shortly after she arrived at Albany Medical Center Hospital (AMCH) on November 15, 2004. (R-2264-2267; A-186-187) He explained that there was extensive brain injury to her right frontal lobe. (R-2267-2268, 2272, 2281; A-187-188, 191-192) Dr. Spongas admitted that during the weeks she was at AMCH there was no neuropsychological testing done on Joan to record whether she was oriented as to time or place or to make any determination of her ability to remember or relate any facts about the attacks she and her husband had suffered. (R-2270, 2294; A-189, 193) Dr. Spongas further conceded that he never reviewed the records of the neuropsychological testing that was done at Sunnyview Rehabilitation Center, where Joan went after her release from AMCH. (R-2294; A-193)

Dr. Mary Dombovy

Dr. Dombovy testified both as Joan's treating neurologist and as an expert in neurology and rehabilitation of people with brain injuries. (R-4972, 4995; A-312, 320) Dr. Dombovy is based in Rochester, New York, where she is the

Department Chair of Neurology and Rehabilitation for Unity Health Systems. (R-4967; A-311) She started treating Joan in October, 2005. (R-4995; A-320)

Dr. Dombovy testified that many people with brain injuries have erratic movements of their arms and legs. (R-4981; A-313) She said that in order to know if someone who moved her head up and down or side to side was actually answering a question, she would have to know much more about her mental status to determine if the movement was actually in response to the question, and/or if it was accurate. (R-4982-4983; A-314-315) She said first she would have to know whether the movement really meant what it was assumed to mean. As she explained in her testimony, there are brain injury patients who may nod their heads up and down but do not really intend the 'yes' response. (R-4982-4983; A-314-315) In order to assess such a person's movements and responses, she would first have to ask a series of questions in order to establish if the person was oriented to person, place, or time. (R-4981; A-313) Next, to determine if the individual was competent to answer questions, she would ask simple, unambiguous questions to which the answer was immediately apparent, e.g., "Are you a woman?" (T-3791, 3793)

Dr. Dombovy further testified that even if a brain-injured person was oriented and able to follow commands, those facts did not mean the person had

any memory of the event that caused the brain injury. (R-4984; A-316) Dr. Dombovy said that when police come to her facility to question someone with a brain injury, she first assesses the person to determine if he or she can provide any useful information. (R-4991-4992; A-317-318) If the person is not oriented, even if he or she can follow simple commands, no useful information can be provided. (R-4992; A-318) If the person is oriented, Dr. Dombovy has a neuropsychologist test the person to verify that he understands what he is being questioned about, and is competent to answer. (R-4992; A-318)

Dr. Dombovy testified about the effect on memory of an injury such as Joan Porco sustained. It was her testimony that, even if Joan was oriented and could generally answer questions (contrary to the evidence of Joan's condition when she was discovered and questioned), it was very unlikely that she would have any memory of the event that caused the injury. (R-5006, 5016-5017; A-326, 329-330) Of particular significance was the fact that many hours had passed between the time of the attacks and the time Joan was discovered. (R-5002-5003; A-323-324) It was estimated that Peter Porco had already been dead for 7-12 hours by the time Joan was questioned and that the attacks had taken place several additional hours before his death. (R-3988, 5002; A-264, 323) Dr. Dombovy explained that by the time the questioning was initiated, massive swelling would have occurred in

Joan's brain. (R-5002-5004; A-323-325) And this swelling would have continued to cause additional injury and impairment for 36-48 hours after the initial trauma, or until the hemorrhage caused by the injury was removed surgically. (R-5004; A-325)

Dr. Dombovy emphasized that with such a serious brain injury, it was "extremely unlikely, if not impossible" Joan could have remembered the event that caused the injury. (R-5016; A-329) Dr. Dombovy said the trauma to the brain prevents that information from being stored, stating, "As soon as that point of impact has occurred, the person doesn't remember the event." (R-5006; A-326) She also said that because the memory of the event was never stored, this memory can never be recovered - it is a permanent loss of that period of time. (R-5007; A-327) Dr. Dombovy testified:

> Given the extensive brain injury that Mrs. Porco had, I think it's extremely unlikely, if not impossible, that she would remember what happened a few, to many, hours before that time because she has the retrograde amnesia; she has the post traumatic amnesia; she had a large hemorrhage in her right front lobe.
>
> After caring for several hundred people in my career with these types of brain injuries, they do not remember the event and they do not remember for some time after that. And they will never regain the memory for that period of time. (R-5016-5017; A-329-330)

Dr. Dombovy said that when she first started seeing Joan Porco in October, 2005, Joan could follow commands and was fully oriented, but still had some

memory impairments in addition to her amnesia regarding the time period both before (retrograde amnesia) and after (post traumatic amnesia) the attack. (R-4995, 5016 ; A-320, 329) Dr. Dombovy said that she had reviewed the records of the neuropsychological testing that had been done shortly prior to Joan's discharge from Sunnyview, records from Albany Medical Center and the records from the paramedics who were at the scene. (R-4996-4997; A-321-322)

As to the questions asked of Joan at the scene, Dr. Dombovy said it might be significant that her sons' names were used, as people with impaired awareness often recognize names of loved ones, but that it is not possible to tell whether she even understood what she was being asked. (R-5019-5021; A-339[a]-331)

At one point during cross-examination, the prosecutor asked Dr. Dombovy if she was aware that Joan had given a "thumbs up sign" when she briefly became conscious at AMC prior to surgery. (R-5043; A-332) Dr. Dombovy said she didn't know what that meant. (R-5043; A-332) The defense objected to the question, and there was a discussion off the record during which the relevant records were reviewed. (R-5043-5044; A-332-333) The trial court then told the jury that "there is no indication in the record that she gave a thumbs up," saying that the records instead reflect that she was requested to move her thumb and did so. (R-5044; A-333)

While on cross-examination Dr. Dombovy also said that there may be instances where people with traumatic brain injury initially have some memory of the traumatic event, but subsequently forget it. (R-5051; A-334) On redirect, she testified that it was extremely unlikely that Joan Porco would be included in this group due to the hemorrhage and extensive nature of the injury. (T-3861, 3863-3864) She said:

> ..[M]ost of the time after a brain injury, people do not remember the event. And depending on the seriousness of the brain injury, they do not remember for a time period after.
>
> Now there are some very selected and somewhat unusual and rare cases where a person just has a focal injury. But in Mrs. Porco's case, she had this hemorrhage that swelled, it caused pressure in her brain, which caused her to most likely have a more diffuse brain injury, which would make it very unlikely that several hours after the event she could accurately remember that event.
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> ***
>
> Based on my experience with traumatic brain injury over many years, based on the literature that I review about traumatic brain injury, I think it is extremely unlikely she would accurately remember that event. (R-5053-5054; A-335-336)

Finally, Dr. Dombovy said that the length of the period of post traumatic amnesia is one of the best indicators of the severity of a TBI. (R-5007; A-327)

Court Instruction

As part of the charge to the jury after summations, the Court told the jury that the *only* direct evidence in the case was the above "nodding" evidence, and that all the other evidence was circumstantial. (R-5479-5480; A-371-372)

Such an instruction concerning such emotionally charged testimony had the extremely prejudicial effect of further highlighting it by directing the jury to give unreliable and inadmissible evidence extra weight in their consideration.

EVIDENCE OF PRIOR "STAGED BURGLARY"

The prosecution introduced evidence of a prior, uncharged, "staged burglary" committed by Appellant at the Porco residence in 2002. While this was admitted under the "identity" *Molineux* exception, the evidence clearly did not meet the requirements of that exception. As discussed below in Point III, the prosecution listed 11 alleged similarities between the murder and the "staged burglary," but many of those "similarities" were meaningless (e.g., that both incidents occurred in November), and some of them were misleading (e.g., references to windows being left open when the "open window" at the murder scene was one that had been bolted open in the garage for ventilation and could not be used to gain access to the house). In short, in order for the two events to be similar, one had to already accept, in a circular fashion, that Appellant committed the murder.

Pretrial Motions

On or about April 17, 2006, the prosecution filed a Memorandum of Law requesting that the district attorney be allowed to elicit evidence of Christopher

Porco's "prior bad acts," including evidence of three prior alleged "staged burglaries." (R-344-362; A-91-109) the defense filed a supplemental Memorandum on June 2, 2006. (R-387-393; A-110-116)

Trial Evidence

The 2002 "staged burglary" was highly prejudicial, had no evidentiary basis and was improperly admitted as a "compromise" Molineux ruling that allowed the prosecution to bring in evidence that one of the computers taken in the 2002 "staged burglary" had been sold on Appellant's eBay account. However, the court ruled that testimony that Appellant was the perpetrator of that "staged burglary" was not admissible. (See R-5420-5421; A-368-369)

Despite the "compromise," Detective Bowdish was allowed to testify about the circumstances of a "burglary" at the Porco residence in November, 2002; that it looked like a front window had been entered and that two laptop computers were missing. (R-3605; A-236) Bowdish added that a window screen had been cut, that there were footprints in the grass leading from the house across the lawn to the driveway, and he could see that they had been there before a recent snow had fallen. (R-3606; A-237)

Near the end of their case, the prosecution presented New York State Police Investigator Gary Kelly, who gave the jury the bombshell testimony that one of the

computers which had been reported stolen in 2002 was tracked to Appellant's eBay account. (R-4137; A-268) Kelly said an Apple i-Book which had been reported stolen from the Porco residence had been sold by Christopher Porco via eBay to a man in San Diego named Doman Ross. (R-4137; A-268) It was stipulated that this was Joan Porco's work computer which had been stolen in November, 2002.

Even though there had been an apparent "compromise" *Molineux* ruling, the prosecution violated this ruling twice during summation. The first time the prosecutor said:

> Well, what did we come to find out during the course of the investigation, the investigation into the murder of his parents, that Christopher Porco is the one who staged that burglary back in November of 2002; that Christopher Porco cut the screen to make it look like it was a traditional burglary and that Christopher Porco took his mother's laptop and using his computer company, he sold it over E-Bay. (R-5379-5380; A-366-367)

Then, later, the prosecutor said that Christopher had been lying to his parents for quite awhile, and said, "[w]e needn't go as far as back in the burglary in 2002 that he perpetrated on them." (R-5420; A-368)

The defense objected, and the court sustained the objection, saying:

Stay within the parameters of the rulings I have made in this matter, all right.

The jury is to disregard the last statement. (R-5420-5421; A-368-369)

ARGUMENT

POINT I

THE CONVICTIONS SHOULD BE REVERSED BECAUSE THE SECOND DEPARTMENT ERRONEOUSLY HELD THAT JOAN PORCO WAS "AVAILABLE" TO TESTIFY - MS. PORCO'S COMPLETE LACK OF MEMORY MEANT THERE WAS NO REAL OPPORTUNITY FOR CROSS EXAMINATION

In its Decision and Order, the Second Department correctly held that the "nodding evidence" was testimonial hearsay under *Crawford v. Washington*, 541 US 36 (2004) and *Davis v. Washington*, 547 US 813 (2006) but erroneously found no constitutional violation because Mrs. Porco was said to be "available" for cross-examination. Then the Decision went on to correctly hold that the "nodding evidence" did not constitute an excited utterance, but also held that error to be harmless under the non-constitutional harmless error standard.

It is argued herein that there *was* a constitutional violation because under the circumstances Mrs. Porco should have been considered "unavailable" under *Crawford* and thus the admission of the "nodding evidence" violated the Sixth Amendment. As a result, the Second Department should have applied the harmless error standard applicable to constitutional violations - i.e., that the error must be harmless beyond a reasonable doubt. See *People v. Johnson*, 1 NY3d 302 (2003).

The Decision stated:

"Here, the affirmative nod was not made spontaneously, but in response to probing, direct questions by the detective and, as such, constituted testimonial hearsay subject to exclusion from evidence in accordance with *Crawford* (*see People v. Ballerstein*, 52 AD3d 1192). Although the defendant's constitutional right of confrontation was not violated here, since his mother, unlike the declarant in *Crawford*, was available to testify at trial, the defendant correctly contends that the detective's testimony concerning the mother's gesture was not admissible on the ground that the nod constituted an excited utterance..." (R-5553; A-374)

The holding, buried in the middle of a sentence, that Christopher Porco's right to confrontation was not violated because his mother was "available" to testify, elevates form over substance. It means that merely showing up to testify is enough. Mrs. Porco was able to testify about many things, but it was conceded that she was completely *unable* to testify about her alleged "nodding" *or* about the underlying events about which she was questioned by the police. Thus there was absolutely *no opportunity* to confront her in any way that mattered. The police testimony regarding the "nodding" evidence stood as if Mrs. Porco had never testified.

Appellant's mother suffered brain damage including retrograde amnesia so severe that her brain was *incapable of ever storing a memory of the attack* on her and her husband. It was undisputed that at the time of trial she had absolutely no memory of the attack (or even any memory of several days surrounding the attack)

and that she never would. *The Decision herein did not state any reason for its holding of availability, nor were any cases cited* as to this proposition.

There are no New York cases dealing with whether undisputed complete and permanent memory loss as to an event *and as to any later questioning regarding said event* renders the person "unavailable" to testify about that event under *Crawford.* Thus the Court must look to other jurisdictions and to analogous situations, one of which is the Fifth Amendment context.

There is no logical distinction with regard to "availability" between the facts in this case and a case where a witness takes the stand and invokes the Fifth Amendment, and is properly held to be "unavailable" under *Crawford. See People v. Savinon*, 100 NY2d 192 (2003); *Whitley v. Ercole*, 2010 WL 2889124 (SDNY 2010); *People v. Stutz*, 2 NY3d 277 (2004).

In *Savinon*, supra, this Court, dealing with "unavailability" in the context of a missing witness instruction, stated:

> "...[A] witness may be readily accessible and even in the courtroom but still be unavailable within the meaning of the rule. Thus a witness who on Fifth Amendment grounds refuses to testify will be considered 'unavailable' although the witness's presence is known and apparent. ... FN5 In defining availability we get some guidance from CPL 670.10(1). That statute authorizes a court to admit prior testimony based on a witness's *unavailability owing to 'death, illness or incapacity,'...*" *Savinon*, supra, at 198

Thus mere presence is *not* enough in the Fifth Amendment context because there would be no point in asking questions which would not be answered. In the same way there was no point in asking Joan Porco questions about the attack or about her later questioning by the police. She simply could not answer any such questions.

As pointed out in *Savinon*, CPL 670.10(1) is instructive here - it provides that a witness is considered "unavailable" based on "incapacity[1]." Clearly Joan Porco is incapacitated. Therefore, she should be considered unavailable under the definition in CPL 670.10(1). Given that, it would be unjust and illogical for the prosecution to have it both ways - to use incapacity to say a witness is "unavailable" so as to introduce that witness's prior testimony, yet to then say that incapacity does *not* render a witness "unavailable" when there is no prior testimony.

It is also instructive to look at CPL 60.25, which provides criteria for determining when identification evidence can be admitted in the event a witness can no longer recall whether the defendant is the person in question. In *People v. Patterson*, 93 NY2d 80 (1999), this Court made it clear that in order for evidence

[1]Of course, CPL 670.10 contemplates the admission of prior *testimony* (where there was a previous opportunity for cross examination and *Crawford* would not apply for that reason). In this case there was no prior testimony and no prior opportunity for cross examination and thus *Crawford* applies and we are left with the definition of "unavailable," which includes incapacity.

of this nature to be admissible, the witness who cannot remember whether the defendant is the perpetrator, *must testify that he or she made the prior identification.*

(Appellant is not arguing that this Court should apply either CPL 670.10 or CPL 60.25 - although CPL 60.25 may well apply. The point is that there was a *constitutional Crawford* violation here, and those statutes are cited merely to provide support for the argument that where there is complete amnesia including a failure to recall an alleged prior identification, the witness cannot be considered "available" under *Crawford* solely by showing up to testify.)

While the holding that mere presence of the body of a witness on the stand is sufficient to satisfy the "availability" prong of *Crawford* appears to follow United States Supreme Court precedent (chiefly *United States v. Owens*, 484 US 554 [1988]), in fact *Owens*, which was decided long before *Crawford*, is distinguishable. *Owens* held that where the witness could not remember the underlying events, *but did have a memory of having subsequently identified the assailant*, there was said to be an opportunity for cross examination if the witness testified at trial.

In sharp contrast to *Owens,* supra, Joan Porco has no memory of having identified her assailant. As shown by Dr. Dombovy's testimony, this is a situation

where the witness has no memory even of the questioning, let alone of having made the responses alleged. It is submitted that in such circumstances putting the witness on the stand provides no more opportunity for cross-examination than if she had not testified at all. She simply cannot be questioned about the attacks, and, in contrast to *Owens*, cannot be examined about the questioning by Det. Bowdish and/or the paramedics either. She cannot say whether she understood what she was being asked, or whether her alleged "nodding" was, as claimed, a meaningful response. She could not speak to the discrepancies among the police and paramedic versions of the events. In these circumstances, reading *Owens* to permit the testimony would make a mockery of the right to cross-examination. While, as stated in *Owens*, that right doesn't guarantee that the cross-examination be effective, it cannot be equivalent to no cross-examination at all, as it is here, with respect to both the attacks and the questioning.

Like *Owens*, the New York case of *People v. Linton*, 21 AD3d 909 (2nd Dep't 2005), which involved a witness who had forgotten the underlying events by the time of trial but remembered testifying at the grand jury, is distinguishable because in that case there was not a complete memory loss *and* because the *Linton* witness not only remembered testifying at the Grand Jury but stated under oath at trial that said Grand Jury testimony was accurate.

While there is a dearth of case-law on this subject in New York, especially post-*Crawford*, there are cases in other jurisdictions where courts have held that a complete inability to testify regarding the relevant facts means that there is no meaningful opportunity for cross-examination and is a violation of *Crawford*. *People v. Learn*, 863 NE2d 1173 (App. Ct. IL, 2d Dist., 2007) (designated here as *Learn I*); *People v. Learn*, 919 NE2d 1042 (App. Ct. IL, 2d Dist., 2009) (*Learn II*); *State v. Canady*, 911 P.2d 104 (Int. Ct. App. HI 1996); *State v. Nyhammer*, 932 A.2d 33 (Sup. Ct. NY, App. Div. 2007), rev'd[1] *State v. Nyhammer*, 963 A.2d 316 (Sup. Ct. NY 2009); *People v. Simmons*, 123 Cal. App.3d 677 (Ct. App. 4th Dist. CA 1981).

Learn I, which had held that the right to confrontation had been violated where the witness took the stand but could not answer any questions about the

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[1]*Nyhammer* was reversed because the higher court held that defense counsel could have cross-examined the child victim about her prior statements but *chose not to do so for strategic reasons*. The higher court stated:

> "...Although defendant had the opportunity to cross-examine Amanda *on the core allegations* contained in [the prior] statement, he declined to do so at trial. ...
>
> ... [D]efense counsel chose not to cross-examine Amanda about the core accusations in the taped interview, perhaps for good reason, fearing that such questioning might have elicited the type of damning responses that eluded the prosecutor on direct examination. That counsel decided to forego critical cross-examination because of Amanda's unresponsiveness to many questions on direct does not mean that defendant was denied the opportunity for cross-examination. *Had counsel directly confronted Amanda on her claims on cross-examination and had she remained completely silent or unresponsive, then we would have a record on which to decide whether her silence or unresponsiveness effectively denied defendant his constitutional right of confrontation.*" *Nyhammer*, at 333-334, emphasis supplied.

relevant events, was remanded for examination in light of *In re Rolandis G.*, 902 NE2d 600 (Sup. Ct. IL, 2008). However, *Rolandis* did not state that the right to confrontation had not been violated, but only that the violation was harmless under the circumstances. In December, 2009, on remand, the *Learn* court again reversed the conviction, and reiterated that a *witness who does not testify about the event in question cannot be considered "available" under Crawford.* In *Learn II*, the court stated:

> "We cannot conclude that a witness' mere presence in court to answer questions without testifying about the alleged offense is sufficient to qualify as testimony... In *Crawford v. Washington*, ... the United States Supreme Court described a declarant's appearance, for purposes of a constitutional confrontation clause analysis, as a situation where 'the declarant is present in court *to defend or explain*' his out-of-court statement. (Emphasis added)
> ...
> ...The central concern of the right to confront is 'to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' *People v. Lofton*, 194 Ill.2d 40, 56, 740 NE2d 782 (2000). The 'confrontation,' then, is a witness's bearing of testimony against the defendant; the defendant then has the right to rigorously test that testimony through cross-examination....
> ...K.O. did not testify at all about the charge in this case. .. She neither made accusations nor gave relevant and material testimony. *The trial court's statement implicitly admitted that K.O.'s 'testimony' was not incriminating or material; had there been any such testimony, the trial court would not have had to allow an expanded scope of cross-examination to go into areas clearly not brought up during the State's questioning.*
> *However, even such a 'generous' expansion of the scope of cross-examination is, at best, a Trojan horse. ...*
> ***

> ...*The witness's inability to answer* the single question about alleged abuse - to accuse the defendant - *led only to the State's ability to bring in other witnesses to testify about what the victim said to them at some other time. Again, the defendant was never given the change to challenge an accusation against him. None was made. The victim's lack of answers inured to the benefit of the State, not to the benefit of the defendant.*
>
> The principal problem at which the confrontation clause was directed was the use of *ex parte* examinations as evidence against the accused in criminal cases. ... The logic behind this is simple: one cannot cross-examine an out-of-court report of what he allegedly said or did. A witness must be placed under oath, with implications... for false testimony, and testify before the trier of fact *about the charges, not about irrelevant or mere background information*. Here's K.O.'s testimony was not incriminating; thus defendant was not confronted by his accuser nor given his right to rigorously test the accusation through cross-examination.
>
> Sir Walter Raleigh, suspecting that his out-of-court accuser, Lord Cobham, would recant if forced to testify in court, proclaimed, ' "[t]he proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face..."' *Crawford*, 541 US, at 44... *Raleigh did not say, 'let some person to whom Cobham told his story come before this court. ...' Mere presence and general testimony are insufficient to qualify as the appearance and testimony of a witness. We conclude that K.O. was unavailable as a witness. ...*
>
> ***
>
> Crawford violations are subject to harmless-error review. ... However, since the only testimony presented at trial was the testimony of C.O., Stokes, and Montemayor, the improper admission of this testimony cannot be held to be harmless error. ..." *Learn II*, at 1049-1051, 1053-1054, emphasis supplied.

As in *Learn*, Joan Porco could not testify with regard to the relevant event, and could not testify regarding the nonverbal accusation she is alleged to have made. In fact, it is submitted that the situation herein, involving undisputed complete and permanent lack of memory, is even more compelling that the

situation in *Learn*, where the child victim was unable or unwilling to discuss the alleged abuse. As in *Learn*, the trial court herein allowed expanded cross-examination, but this was meaningless as to the central allegations, which could not be confronted.

Moreover, as in *Learn*, Joan's lack of ability to answer those crucial questions inured to the benefit of the government, not the defense. Although Joan testified that she knew her son was not capable of such a crime, the prosecution used the unconfronted "nodding" evidence to undermine that testimony, arguing that the alleged "nod" represented the "truth," and that her later testimony was that of a mother in denial.

In *Simmons*, supra, which was decided prior to *Owens* but is distinguishable because, as in the instant case, the witness did not recall the event *or* the alleged statement, the court held that in a case of amnesia, there is no opportunity for confrontation, stating:

> "...Here, the witness allegedly made an oral statement, which he signed after it was reduced to writing, containing purported admissions made to him by the defendant... However, shortly after the witness made these extrajudicial statements, he suffered a serious injury to his head...
>
> The People claim ... the witness was being evasive because his recall is selective. However ... the magistrate ... stated, 'Well, here is a person who has what we call retrograde amnesia... [O]f course, *having retrograde amnesia, he can't say whether ,,, [the statements] are false, or true, or accurate or not.*' ...

...Here we lack either contemporaneous cross-examination or the ability to meaningfully confront and cross-examine the witness at trial.

Observing the demeanor of an amnesiac witness when questioned about that which he is incapable of recalling is as meaningless as attempting to gain information as to the truth of the unknown facts from his responses. ...

The confrontation clause is to assure the trier of fact has a satisfactory basis for evaluating the truth of the prior statement....

***

In this case, the witness does not recall any event recorded in this prior statement, *nor even making it or any circumstances surrounding its preparation... The fact is, he simply has no knowledge at all....*" *Simmons*, supra, at 680-683, emphasis supplied.

It is submitted that the instant case is much stronger than *Simmons*, where the prosecution claimed the witness was being evasive. Here we have undisputed complete and permanent amnesia rendering the witness incapable of providing *any* meaningful responses with regard to the event in question, or the alleged nodding. It would be equivalent to questioning someone who was not even present. A completely meaningless "opportunity" for cross-examination should not suffice under *Crawford* and the Sixth Amendment.

POINT II

THE "NODDING" WAS THE *ONLY* DIRECT EVIDENCE IN THE CASE AND ITS ERRONEOUS INTRODUCTION CANNOT BE CONSIDERED HARMLESS

As argued above, this Court should hold that Christopher Porco's Sixth Amendment right to confrontation *was* violated, and therefore should apply the

constitutional harmless error standard: that the prosecution has the burden to show that the error is harmless *beyond a reasonable doubt. People v. Goldstein*, 6 NY3d 119 (2005); *People v. Johnson*, 1 NY3d 302 (2003). The prosecution has not met and cannot meet that burden.

However, even if the Court were to apply the non-constitutional harmless error standard, as set forth in *People v. Crimmins*, 36 NY2d 230 (1975) and subsequent cases, that standard was not met either, because the evidence was not overwhelming, and because the error was incredibly prejudicial. In *Crimmins*, supra, this Court stated:

> "Two discrete considerations are relevant and have combined in varying proportions... The first of such factors is the quantum and nature of proof of the defendant's guilt if the error in question were to be wholly excised. The second is the causal effect which it is judged that the particular error may nonetheless have had on the actual verdict....
>
> ***
>
> Our State test with respect to nonconstitutional error is not so exacting as the Supreme Court test for constitutional error. *We observe that in either instance, of course, unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error. That is, every error of law* (save, perhaps, one of the sheerest technicality) *is, ipso facto, deemed to be prejudicial and to require a reversal, unless that error can be rendered harmless by the weight and nature of the other proof. ... What is meant here, of course, is that the quantum and nature of proof, excising the error, are so logically compelling and therefore forceful in the particular case as to lead the appellate court to the conclusion that 'a jury composed of honest, well-intentioned, and reasonable men and women' on consideration of such evidence would almost certainly have convicted the defendant.*

> If, however, an appellate court has satisfied itself that there was overwhelming proof of the defendant's guilt, its inquiry does not end there... An evaluation must therefore be made as to the potential of the particular error for prejudice to the defendant. We hold that an error is prejudicial in this context if the appellate court concludes that there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred." *Crimmins*, at 240-242, emphasis supplied.

It is submitted that under *either* standard, constitutional or nonconstitutional, the error with respect to the "nodding" evidence cannot be considered harmless. While the trial in this case lasted from June to August, 2006, and included testimony from 84 witnesses, with a transcript of over 4000 pages, the evidence was largely both ambiguous and circumstantial. In fact, the court instructed the jury that the *only* direct evidence in the case was the "nodding" evidence discussed in Point I, and that all of the other evidence was circumstantial. The court stated:

> "Now, ladies and gentlemen, I've determined as a matter of fact and law, that *the only possible direct evidence in this case is the nodding and shaking of Joan Porco's head* by Detective Christopher Bowdish and paramedic, Kevin Robert, while she was lying on her bed in her bedroom on the 15th day of November, 2004.
>
> I charge you, ladies and gentlemen, that whether or not Joan Porco had memory of the events surrounding the assault of that morning, was oriented as to time and place and/or understood what was being asked of her or what she was responding to, that these are all questions of fact to be decided by you, the members of the jury.
>
> If you find that such evidence of Joan Porco's head nods and head shakes do not constitute a knowing and intelligent response to

> the questions posed to her that morning or that she had no memory of her assault that morning or that the people have failed to prove any fact of that scenario beyond a reasonable doubt then, ladies and gentlemen, *the remaining evidence in this case, in this trial, is all circumstantial evidence* and as such, should be evaluated pursuant to the following charge concerning circumstantial evidence." (R-5479-5480; A-371-372, emphasis supplied)

It may be that the sheer amount of information and the emotional impact of an allegation attributed to Appellant's mother that she witnessed her child commit violent acts against his parents made it difficult for the jury to sort through all of the evidence and determine whether guilt was actually proven beyond a reasonable doubt. Given this situation, there is no way that *any* error can be considered harmless. And the error concerning admission of the "nodding" evidence wasn't just *any* error - it involved the *only direct evidence in the case*. Moreover, the prosecutor clearly realized the crucial nature of the alleged "nod," as he mentioned it four times in his opening and twelve times in his closing. He also showed how important it was to his case by spending a lot of time on the "nodding" evidence right near the beginning of his closing, and then coming back to it at the end, saying either Christopher Porco is guilty, or he "is the unluckiest man on the face of the planet, because on the morning that his parents are attacked and his father is brutally murdered, *his mother nods yes when asked if he did it.*" (R-5437; A-370)

While the defense attempted to minimize the impact of this "nodding" evidence and presented the testimony of Dr. Dombovy, this testimony never should have been heard by the jury at all. Despite its lack of reliability, the nodding evidence, presented at considerable length by three different prosecution witnesses, was extremely prejudicial to the Appellant. In truth, it is hard to imagine anything more prejudicial than a mother, on her death bed, accusing her own child of murdering his father and attempting to do the same to her. It was impossible for the jury to disregard such "testimony" and fairly consider the balance of the evidence presented.

What follows is a discussion of the most important pieces of evidence other than the "nodding" evidence, and an analysis of its relative strengths and weaknesses.

As set forth in the Statement of Facts, in addition to the improper nodding evidence (and the prior "staged burglary," which is discussed below) the main evidence presented consisted of inconclusive mitochondrial DNA and toll ticket evidence; surveillance footage from the University of Rochester; the testimony of witnesses regarding when they saw Appellant; the testimony regarding Appellant allegedly not being in the lounge in Munro Hall at various times; the evidence regarding the Porco alarm system; and the testimony of Marshall Gokey.

It is submitted that if the jury had not been prejudiced by the improper introduction of the"nodding" evidence, the jurors would have been much more skeptical of the claims by the toll collectors and Mr. Gokey that they allegedly remembered seeing Christopher's Jeep, and would have generally regarded the prosecution's evidence in a more critical light.

Evidence favorable to the defense consisted of the testimony of Dr. Hubbard indicating that the time of Peter Porco's death was very likely to have been earlier than the time which fits with the prosecution's theory; the evidence that the Jeep had not been recently cleaned and did not contain blood; the lack of evidence that the scene of the attacks had been cleaned; the testimony of Stephen Meyers that he saw two speeding cars (a very rare event in that area at that time) on the night in question at a time which also did not fit into the prosecution's theory; several other pieces of evidence which were not adequately investigated by the police (the Seiko watch with DNA from two unknown donors, the fingerprint on the telephone box near where the wires were cut, the two times Joan Porco saw a stranger in the driveway not long before the attacks, the death threats of Patrick Delucia, and the connection with the mob figure Frank the Fireman Porco) and the testimony of Joan Porco about her son.

Looking at the evidence as a whole, there is substantial reasonable doubt as to Christopher Porco's guilt. Significantly, Dr. Hubbard's testimony as to the time of death flies in the face of the prosecution's carefully constructed timeline. Much of the prosecution's evidence simply shows the undisputed fact that Christopher was on campus at certain times on the night of the 14th and the morning of the 15th - it does not show where he was in between those times. And, as described above, there are many pieces of evidence which simply did not fit into the police and prosecution's theory, and were thus discarded.

There are several cases which have held that erroneously admitted identification evidence could not be considered harmless, and other circumstantial evidence cases where various types of error were held not to be harmless under those circumstances.

In *People v. Mullins*, 70 NY2d 855 (1987), another case where the improperly admitted evidence was the only direct evidence in the case, this Court said, at 857, the error could not be harmless, stating, "..the error was not harmless. Here defendant was convicted of burglary in the second degree, and the erroneously admitted in-court identifications were the only direct evidence..."

In addition, the hearsay error herein is analogous to a *Trowbridge* error (where an out-of-court identification is bolstered by another witness) and this type

of error cannot be harmless whenever identity is an issue, as it surely was in this case. In *People v. Jones*, 51 AD3d 690 (2nd Dep't 2008), the court stated, "'[A] *Trowbridge* error cannot be deemed harmless unless the evidence of identity is "so strong that there is no substantial issue on the point"'" *Jones,* supra, at 692, quoting *People v. Walston*, 99 AD2d 847 (2nd Dep't 1984) and *People v. Mobley*, 56 NY2d 584 (1982). In this case, it is submitted that the error was far more prejudicial than the bolstering involved with *Trowbridge* errors, as the "nodding" evidence allegedly identifying Appellant as the perpetrator would not have been introduced at all were it not for the error.

There are many cases involving only circumstantial evidence where errors were held not to be harmless because, as in the instant case, the evidence could not properly be called overwhelming, and/or the error was extremely prejudicial. See, e.g., *People v. Stubbs*, 910 NYS2d 829 (4th Dep't 2010); *People v. Edwards*, 23 AD3d 1140 (4th Dep't 2005); *People v. Boston*, 296 AD2d 576 (2nd Dep't 2002); *People v. Blake,* 139 AD2d 110 (1st Dep't 1988); *People v. Perotta*, 121 AD2d 659 (2nd Dep't 1986); *People v. Blake*, 96 AD2d 971 (3rd Dep't 1983).

In *Blake*, supra, the court stated:

> *"This was a very close and wholly circumstantial evidence case, requiring the jury to engage in a very complex and difficult reasoning process. That deliberative process was made even more difficult by the crime involved here, a ghastly and incomprehensible*

> *murder*. These factors magnified the prejudicial impact of certain trial errors which, in combination, require a reversal...
>
> ***
>
> Although we find that [the] ... evidence was sufficient, as a matter of law, to support the jury's verdict, we have serious doubts that the jury was able to accord the evidence its proper weight given the prejudicial nature of certain trial errors..." *Blake*, supra, at 111, 114, emphasis supplied.

Like *Blake*, the instant case involved a "ghastly and incomprehensible murder" and was, apart from the nodding evidence, wholly circumstantial. The trial in this case lasted from June to August, and included testimony from 84 witnesses, with a transcript of over 4000 pages, yet, in addition to being all circumstantial, the evidence was very ambiguous. It is hard to conceive of testimony more prejudicial than an allegation that a *mother* indicated that her child killed his father and maimed her. To speculate that such evidence had no impact on the jury defies common sense. Further supporting the import and prejudicial effect of the alleged "nod" is the fact that, once it was observed by the police, *they* found it so persuasive that they looked for no other suspects, discounting evidence pointing to another perpetrator (including a fingerprint found by the cut telephone wires that did not match Appellant) and focused all of their energies on investigation and prosecution of Appellant. (See R-3612-3613, 3712-3718; A-242-242[a], 244[a]-245[b]) In order to find the admission of the testimony to be

harmless, one needs to conclude that lay jurors would wholly discount information which had the upmost significance to the police.

In *Perrotta*, supra, the court stated:

> "While the trial court's charge to the jury on circumstantial evidence was not a misstatement of law, we find that under the circumstances of this case, it failed to adequately convey to the jury the reasoning process in assessing such proof. The proof of guilt was strong but not overwhelming. For that reason, the inadequacy of the charge was prejudicial error requiring reversal and a new trial..." *Perrotta*, supra, at 659-660, citations deleted.

As in *Perrotta*, while the trial court herein properly gave a circumstantial evidence charge, the explanation with regard to the nodding evidence, quoted above, was very confusing and may have led the jury to improperly rely on said nodding evidence, or to not follow the circumstantial evidence instruction because they did not understand whether it applied or not.

In *People v. Ryan*, 17 AD3d 1 (3rd Dep't 2005), a largely circumstantial case where the erroneously admitted evidence buttressed the only *direct* evidence, the court reversed the conviction, stating:

> "...[W]e note that the proof, though largely circumstantial, did include evidence of defendant's own inculpatory statements. However, defendant repudiated such statements in his trial testimony and the jury was instructed that it could only accept defendant's admissions if it found that they were voluntarily made. Under these circumstances, the statements of [accomplices] Rolon and Haskins, which mirrored those of defendant in crucial aspects, had an 'enormously damaging' two-fold effect of buttressing the reliability of defendant's own confession in the eyes of the

jury while simultaneously providing additional substantive proof of his guilt...." *Ryan*, supra, at 728.

In the case at bar, the damaging effect of the "nodding" evidence was even worse than that described in *Ryan*, where the erroneously admitted evidence dovetailed with the direct evidence of the defendant's admissions - in this case, there were no admissions or other direct evidence other than the erroneously admitted evidence.

In *People v. Bernardo*, 83 AD2d 1 (2nd Dep't 1981), a murder case involving nearly all circumstantial evidence, the court reversed the conviction and stated:

> "...[I]t is clear that the prosecution relied almost wholly on circumstantial evidence to establish the guilt of the accused. Therefore, in such an instance, the circumstances must be satisfactorily established, and of such character as, if true, would exclude to a moral certainty every other hypothesis except that of the accused's guilt. Not only must all of the circumstances be consistent with and point to the accused's guilt, but they must be inconsistent with his innocence." *Bernardo*, supra, citations deleted.

As in *Bernardo*, aside from the "nodding" evidence, the entire case was circumstantial. And the jury may well have believed there were possible hypotheses which were consistent with innocence, but still convicted Appellant based on the direct "nodding" evidence. This is probably what the prosecutor was

hoping for when he put such a great emphasis on the "nodding" evidence in his summation. There is no way such an error can be considered harmless in this case.

POINT III

THE SECOND DEPARTMENT ERRED IN UPHOLDING THE ADMISSION OF EVIDENCE OF A PRIOR "STAGED BURGLARY" WHICH DID NOT FIT WITHIN THE "IDENTITY" EXCEPTION TO *MOLINEUX*

Evidence of prior uncharged crimes or "bad acts" is not admissible unless it is relevant to a material element of the crime. *People v. Arafet*, 2009 WL 3378417 (2009); *People v. Hurdy,* 73 NY2d 40, 55; *People v. Ventigmilia,* 52 NY2d 350; *People v. Rodriguez,* 274 AD2d 593 (2nd Dep't 2000).

The prosecution admitted evidence of an incident which it characterized as a "staged burglary" at the Porco residence in 2002. The evidence was introduced under the "identity" exception to *Molineux*, which requires a showing that there was a unique *modus operandi*. However, there is no evidence of such a "signature" crime, and the dissimilarities far outweigh any similarities. Despite the conclusory statement of the Appellate Division, Second Department that the evidence herein was "sufficiently unique," there is nothing in the circumstances of the alleged staged burglary which compel the conclusion that the same individual committed that and the present offense, the standard which must be applied before any such evidence may be admitted.

The *Molineux* court made it clear that the "identity" exception was quite limited, due to the great potential for prejudice, stating:

> In the nature of things there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent or plan, will serve to identify the person who committed one as the same person who is guilty of the other. The very fact that it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict, not upon the evidence of the crime charged, but upon the super-added evidence of the previous crime. *People v. Molineux*, 168 NY 264, 313.

Thus, in order for evidence of a prior crime to be admitted as probative of identity, certain conditions must be established by *clear and convincing evidence* - first, that it was the defendant who actually committed the prior crime; and secondly that there was a *very unique and distinctive modus operandi* utilized during both the prior crime and the offense for which the defendant is on trial. *People v. Robinson*, 68 NY2d 541, 550 (1986); *People v. Rodriguez*, 274 AD2d 593, 594 (2nd Dep't 2000); *People v. Stubbs*, 910 NYS2d 829 (4th Dep't 2010) . In *Robinson*, this Court reversed the conviction because the trial court had erroneously allowed the evidence and stated:

> "The foregoing analysis leads us to conclude that a Trial Judge who admits evidence of an uncharged crime on the issue of identity on less than clear and convincing proof of both a *unique modus operandi* and of defendant's identity as the perpetrator of the crimes abuses his discretion as a matter of law." *Robinson*, supra, at 550, emphasis supplied.

In *Stubbs*, the Fourth Department very recently reversed the conviction because evidence of a prior robbery had been erroneously allowed as evidence of identity and *modus operandi*. The court stated:

> "...[D]efendant contends that Supreme Court erred in admitting evidence with respect to a prior robbery committed by defendant in 1993 and a prior attemped robbery committed by defendant in 1997... We agree. We reject the contention of the People that the evidence was properly admitted to establish the identity of defendant based on his modus operandi... We conclude that defendant's method of committing the prior crimes, i.e. traveling to a retail establishment as a passenger in a motor vehicle and threatening the cashier at that establishment with the use of a nonexistent gun 'was not "sufficiently unique to be probative of the issue of identity"' (*People v. Pittman*, 49 AD3d 1166, 1167, quoting *People v. Beam*, 57 NY2d 241... In addition, we conclude that the prejudicial effect of the evidence concerning the prior crimes outweighed its probative value..." *Stubbs*, supra, at 830.

As in *Stubbs*, the circumstances with respect to the prior "staged burglary" were not sufficiently unique to justify the admission of this evidence - unless one already *assumes* that the same person committed both that crime and the attack herein.

Cases Where the Identity Exception was Allowed

Generally, where the identity exception was properly invoked, the uncharged crimes were the same type of offense as the charged crime. However, even in cases where the crimes were not the same, there were extremely unique elements to both offenses, such as "...the identifiable characteristics of the crimes

committed by the notorious 'Jack the Ripper.'" *People v. Condon*, 26 NY2d 139, 144.

It is helpful to examine two cases where, in contrast to the instant case, there *was* a highly distinctive modus operandi. In *People v. Beam*, 57 NY2d 241 (1982), uncharged homosexual assaults were admissible to prove identity where all victims of charged and uncharged crimes were young men in their late teens; were approached by a man of the same description in the same general area; the man offered marihuana to each youth; lured each to the same isolated location; told each youth he was from out of town and on his way somewhere; and forced each youth to disrobe and perform oral sodomy and french kissing.

In *People v. Allweiss*, 48 NY2d 40, 48 (1979), the identity exception justified admission of uncharged rapes in a murder case, but only because there were several very unusual common features to each case. In *Allweiss*, the defendant had earlier spoken on the telephone to the murder victim's boyfriend when he called, and said that he was in the apartment building looking for a man who had previously raped his wife. Subsequently, the victim was found dead, wearing a slip, with a knife sticking out of her stomach and a pair of pantyhose around her neck - her lingerie drawer was the only area of the apartment that had been ransacked. The court upheld the introduction of evidence that the defendant

had pled guilty to six prior rapes which also involved rummaging through lingerie drawers, the use of pantyhose as a rope, and in some cases, an unusual story about someone having raped and murdered his wife or fiancee. The court stated:

> ...[I]n order to identify the defendant in this manner it is not sufficient to show that he has committed similar acts if the method used is not uncommon.
> ...[T[here are certain oddities which alone, or in combination with the other circumstances, serve to distinguish the defendant's criminal acts. The most peculiar feature undoubtedly is the bizarre story the defendant told concerning the rape and assault on his wife or fiancee. He mentioned it to one of his rape victims in August and to another in September...
> There is also the defendant's compelling interest in lingerie. He habitually rummaged through his victim's lingerie as a prelude to the rapes. ...The testimony of the other victims shows that this was a consistent pattern in all six of the rapes. It was evidenced also at the scene of the homicide where the lingerie drawer was in disarray....
> *People v. Allweiss*, supra, at 47-48

A. There were no Significant Similarities Justifying the Exception

The instant case presents a very stark contrast to the above cases where there were such compelling similarities between the charged crime and the uncharged crimes. In a pretrial memorandum, the prosecution unpersuasively argued that events surrounding the stealing of electronic equipment are somehow the same as those of the axe murder, based on a list of alleged "similarities" which do not hold up under scrutiny.

In their pretrial memorandum, the prosecution lists 11 alleged "similarities"

with the murder. (R-359; A-106) The prosecutor stated:

> The November, 2002 crime at Brockley Drive shared these similarities with the Murder scene: (1) There was a first floor screen cut in the same manner, (2) A first floor window was left open, (3) there was no random rummaging through the house, (4) the family dog did not alert Peter or Joan Porco to an intruder, (5) It occurred at 36 Brockley Drive, (7) It was committed in November, (8) The perpetrator had easy access to the inside of the house, (9) The perpetrator staged the scene to make it appear he did not have easy access, (10) The perpetrator had a close relationship with the victims, and (11) The perpetrator had an intimate knowledge of the scene (evidenced by the perpetrator having the ability to attack Peter and Joan while they slept). *Id.*

Some of the alleged "similarities" are just silly, e.g. "It was committed in November," referring to the theft and the murder. More significantly, the prosecution's argument is basically an extremely circular self-fulfilling prophecy - the only way to argue that the crimes look similar is if one first accepts the premise that Christopher committed both of them and then double or triple count each "fact." The prosecution was allowed to argue that because Christopher stole from his parents, he must have wanted to kill them.

In reality, the only objective "similarity" *could have been* that a screen was either cut or damaged at the Brockley residence and that a first floor window was left open. However, a more careful examination reveals that there was no real similarity here.

As discussed in Appellant's Supplementary Memorandum, filed on June 2,

2006, in the 2002 "staged burglary," a screen was cut and a window left open in the living room, presumably to make police think there had been an intruder. (R-388; A-111) The prosecution argued that this was similar to there having been a torn screen and window in the garage (on the other side of the house) which was partially bolted open at the time of the murder. But, as shown by the testimony of Johnathan Porco, this window had been bolted open slightly in order to provide ventilation in the garage. (R-3447, 5377; A-232, 365) Moreover, it was clear that *no one could have entered through the opening in that window*, thus it could not have fooled police into thinking an intruder had utilized this manner of entry. (R-3448, 5377; A-233, 365) Thus the main "similarity" alleged by the prosecution was not similar at all.

Other alleged "similarities" are in fact the *non-existence* of evidence and carry no real weight in the absence of an explanation of why they are unique in some way, i.e. "no random rummaging" and the "dog did not alert Peter or Joan Porco." Again, in many burglaries and thefts, specific property, whether it be jewels or electronic equipment, is taken, with no further damage to the home. It is when the perpetrator leaves a "calling card" that such evidence can come in, not when there is nothing distinct.

As to the dog, Barrister, there was uncontradicted testimony at trial that he

did not bark when strangers came to the house. Sarah Fischer, Christopher's friend and one of the first witnesses called by the prosecution, testified that Barrister never barked when she came to the house, and did not even bark the first time she went to the Porco residence. (R-1998, 2017; A-173-174) Both Joan and Veterinarian Elaine LaForte (who took Barrister into her home after the attacks) testified that Barrister would not bark when strangers came to the house. (R-4219, 5222; A-274, 357)

Moreover, it is clear that many of the alleged "similarities" are both redundant and impermissibly rely on the assumption that Christopher Porco committed both crimes, e.g. "perpetrator had easy access to the inside of the house," "perpetrator staged the scene to make it appear that he did not have easy access," and "perpetrator had an intimate knowledge of the scene." (R-359; A-106)

Significantly, the theft from the Brockley residence was a *nonviolent* low-level property crime. No weapon was used, no one was threatened and no one was injured, much less killed. Entry was gained to obtain electronic equipment. In stark contrast, the murder and attack in the instant case was carried out in a vicious fashion with both victims left smashed and bleeding in their bed. No property was

taken from the house, even though electronic equipment was in plain view and easily accessible.

It is submitted that a comparison of the instant case with those cases where there was a compellingly similar *modus operandi* shows clearly that the prior "staged burglary" does not come close to meeting the strict requirements of the identity exception.

It is helpful to think of it this way: if it was known that someone entered the house in 2002, tore a screen and stole a computer, and it was also known that someone entered the house in 2004, viciously attacked the Porcos and fled without stealing anything, is there any "signature" to show that the same person committed both crimes? Clearly not, and thus the identity exception is not applicable.

Cases where the identity exception was not allowed

In *People v. Pittman*, 49 AD3d 1166 (4th Dep't 2008) the court reversed the attempted murder conviction because the trial court had erroneously allowed evidence of a prior crime under the identity exception, stating that "...Defendant's conduct in the 1998 incident and the present incident was not sufficiently unique to be probative on the issue of identity." *Pittman*, at 1167. See also *People v. Stubbs*, supra.

In *People v. Comstock*, 266 AD2d 856 (4th Dep't 1999) and *People v.*

Miguel, 146 AD2d 808 (2nd Dep't 1989), the courts held that the trial court had erroneously allowed evidence of prior larcenies or attempted larcenies committed against the *same business* because they "lacked sufficient similarity to the instant crime to have a significant bearing upon the identity issue." *Comstock*, supra, at 857.

In *People v. Donaldson*, 138 AD2d 730 (2nd Dep't 1988), the Second Department court reversed the burglary conviction where the trial court had erroneously admitted evidence of a prior attempted burglary *at the same apartment the week before*. The court stated:

> ...The defendant's indictment and conviction arose out of the burglary of the complainant's apartment on November 21, 1981. We agree with the defendant's argument that the trial court committed reversible error by admitting evidence of the defendant's purported prior attempt to burglarize the complainant's apartment on November 13, 1981....
> In the case at bar, the uncharged crime was admitted to show the defendant's identity. However, the People failed to establish by clear and convincing evidence, as they were required to do in order to obtain the benefit of the exception to the general rule, that the defendant was the perpetrator of the uncharged crime, *and that the method used in both crimes was sufficiently unique as to make it highly probable that both crimes were committed by the defendant.* *Donaldson*, supra, at 730. Emphasis added.

Thus, as shown by *Donaldson*, *Comstock* and *Miguel*, the fact that the prior burglary occurred in the same location as the murder, one of the "similarities" noted by the government, carries very little weight, particularly when there are no

unique qualities.

In conclusion, there are no meaningful "similarities" between the 2002 "staged burglary" and the murder. There is nothing to constitute a distinctive and unique modus operandi for the identity exception to *Molineux*. The evidence of the 2002 "staged burglary" should therefore have been excluded.

B. There was no proper balancing test

Further, even if, *arguendo*, the evidence of prior bad acts could be said to fit into one or more proper *Molineux* exceptions, it is submitted that the trial court did not engage in the proper balancing test when considering whether the highly prejudicial nature of the evidence outweighed any probative value. There was no written decision and there was no other indication that the court had properly performed the required balancing test.

In *People v. Wlasiuk*, 32 AD3d 674 (3rd Dep't 2006), the court discussed the trial court's role with respect to this balancing test, which was not properly performed in that case either, stating:

> ...While there is a premise that evidence of uncharged crimes is inadmissible, such evidence may be used during the prosecution's case-in-chief if it is probative of some legally relevant and material issue aside from the defendant's propensity to commit the crime charged. Once this threshold determination is made as a matter of law, the trial court has the discretion to admit the evidence after balancing its probative worth against its potential for undue prejudice. *Indeed, '[i]n deciding whether to admit evidence of prior criminal or*

> *immoral conduct..., the trial court must take special care to ensure not only that the evidence bears some articulable relation to the issue, but also that its probative value in facts warrants its admission despite the potential for prejudice.'* (*People v. Santarelli*, 49 NY2d 241, 250 [1980]).
>
> ***
>
> In this case, after much but not all of the testimony at issue, County Court instructed the jury that the proof was not to be taken as evidence of defendant's violent propensities and was only relevant to his motive and/or intent. *However, there is no record evidence that County Court attempted to measure the probative value of the evidence by ascertaining the necessity of its presentation or whether it was cumulative of other evidence presented by the People... Notably, this record also does not support the conclusion that County Court engaged in a substantive balancing of the probative value of the evidence against its potential to unduly prejudice defendant. ...Accordingly, upon this record, we cannot conclude that evidence of defendant's prior acts of domestic violence was properly admitted. Wlasiuk*, supra, at 676-678, emphasis supplied and most citations deleted.

As in *Wlasiuk*, the record herein reflects that the trial court did not engage in the proper balancing test. There was no written decision, nor does there appear to be any decision made on the record with regard to this crucial evidence.

C. The improper evidence was very prejudicial

Significantly, the evidence of the "staged burglary" was presented near the end of the prosecution's case. Although Det. Bowdish had earlier testified about the 2002 burglary, the bombshell evidence that Appellant was responsible for this crime did not come until NYSP Inv. Gary Kelly testified weeks later.

Even though there had been an apparent "compromise" *Molineux* ruling, the

prosecution violated this ruling twice during summation. The first time the prosecutor said:

> Well, what did we come to find out during the course of the investigation, the investigation into the murder of his parents, that Christopher Porco is the one who staged that burglary back in November of 2002; that Christopher Porco cut the screen to make it look like it was a traditional burglary and that Christopher Porco took his mother's laptop and using his computer company, he sold it over E-Bay. (R-5379-5380; A-366-367)

Then, later in his summation, the prosecutor said that Christopher had been lying to his parents for quite awhile, and said, "[w]e needn't go as far as back in the burglary in 2002 that he perpetrated on them." (R-5420; A-368)

At that point the defense objected, and the court sustained the objection, saying:

> Stay within the parameters of the rulings I have made in this matter, all right.
> The jury is to disregard the last statement. (R-5420-5421; A-368-36)

However, the damage had already been done, and it cannot be said that the erroneous introduction of the prior "staged burglary" was in any way harmless. In *Stubbs*, the Fourth Department very recently stated:

> "We reject the ... contention of the People that the error in admitting evidence of the prior crimes is harmless. ...[A]lthough there was strong circumstantial evidence connecting defendant to the robbery, it cannot be said that such proof was overwhelming and that there is no significant probability that defendant would have been acquitted but for the evidence concerning the prior crimes..." *Stubbs*, supra, at 830-831

The "staged burglary" evidence was extremely prejudicial, allowing the jurors to reason that if Appellant had a propensity to stage burglaries at his home, there was nothing he would not stoop to, including a vicious and unprovoked attack on his sleeping parents. This error cannot be considered harmless.

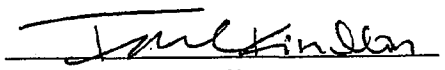
CONCLUSION

Based on the foregoing, this Court should reverse Appellant's convictions.

Dated: January 19, 2011

Respectfully submitted,

KINDLON SHANKS and ASSOCIATES

By: 

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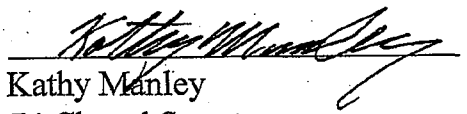

Kathy Manley
74 Chapel Street
Albany, New York 12207
(518) 434-1493